

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH ALAN CRUCE,

Defendant-Appellant.

UNPUBLISHED

August 21, 2007

No. 270412

Wayne Circuit Court

LC No. 06-000662-01

Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant was convicted of three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13 years of age), and one count of indecent exposure, MCL 750.335a. He was sentenced to 40 months to 15 years' imprisonment for each CSC II conviction and to six months to one year for the indecent exposure conviction. Defendant appeals as of right. We affirm.

Defendant argues on appeal that he was denied the right to present a defense because evidence that the victim was caught shoplifting two weeks before she disclosed his sexual misconduct was excluded, thereby eviscerating defendant's defense that the victim had a motive to lie. We disagree. This Court reviews de novo a defendant's preserved claim that he was denied the right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). A trial court's determination to admit or exclude evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Under the federal and state constitutions, a criminal defendant has a fundamental right to present a defense. US Const, Am VI; Const 1963, art 1, § 13; *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006). Criminal defendants "have the right to . . . put before a jury evidence that might influence the determination of guilt." *Id.* (quoting *Pennsylvania v Ritchie*, 480 US 39, 56; 107 S Ct 989; 94 L Ed 2d 40 (1987)). However, the "accused must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict." *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984) (citing *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973)). In addition, evidentiary determinations do not generally give rise to constitutional violations. *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986).

However, irrelevant evidence is inadmissible. MRE 401; MRE 402. “Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence.” *People v Crawford*, 458 Mich 376, 387-388; 582 NW2d 785 (1998) (quoting *United States v Sampson*, 980 F2d 883, 888 (CA 3, 1992)). Thus, relevant evidence is evidence that is material and has probative force. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant’s theory of the case was that the victim accused him of sexual misconduct as a way to deflect negative attention away from herself. He therefore contends that the testimony was admissible because it had some tendency to show that the victim had a motive to lie. However, even if material, we find that the evidence lacks probative value because it is too remote and speculative. Defendant’s offer of proof did not establish any relationship whatsoever between the victim’s shoplifting and defendant. Rather, defendant merely argued that the victim was caught shoplifting and then two weeks later disclosed defendant’s sexual misconduct. The trial court reasonably concluded that accusing an adult of sexual abuse was an unlikely response to getting in trouble. Also, the two-week delay after being caught suggests that the victim would already have weathered the bulk of the negative attention from the shoplifting. The trial court did not err in finding defendant’s desired inference from the contested testimony to be excessively tenuous, and disallowing the testimony on that basis.

Defendant next argues on appeal that he was denied a fair trial by the prosecutor’s remarks during opening statement calling him a “dirty old man,” and by a witness’s description of defendant as “perverted.” We disagree. Preserved claims of prosecutorial misconduct are reviewed de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Unpreserved claims of prosecutorial misconduct are reviewed for plain error that affected defendant’s substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Unpreserved constitutional claims warrant reversal only when a plain error resulted in a conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

The test of prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct claims are decided case by case, and the prosecutor’s remarks are evaluated in context. *Id.* During opening statement, the prosecutor must state the facts that she intends to prove at trial and present her theory of the case. MCR 6.414(C). However, a prosecutor does not need to keep her remarks to the “blandest of all possible terms.” *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001) (quoting *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989)). In addition, the prosecution “must refrain from denigrating a defendant with intemperate and prejudicial remarks,” *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). Last, a prosecutor’s “good-faith effort to admit evidence does not constitute misconduct.” *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Here, the complained-of remarks by the prosecutor were limited. Given that the prosecutor does not have to use the blandest terms possible, we observe that the prosecutor could have permissibly stated that she was going to prove that defendant was a “child molester,” which may be even more prejudicial to defendant than calling him a “dirty old man.” Her statement that she was going to prove defendant was a “dirty old man” therefore did not constitute

prosecutorial misconduct. Defendant asserts that the prosecutor knew the witness would describe him as “perverted,” but in fact the prosecutor only knew that the witness would testify that defendant was inappropriate with her. The prosecutor stated that she did not give notice because she did not think it was MRE 404(b) evidence. Thus, the prosecutor’s effort to admit evidence was not made in bad faith, so it does not constitute prosecutorial misconduct.

Furthermore, just before the prosecutor’s opening remarks, the trial court instructed the jury that the attorney’s remarks were not evidence. The court again instructed the jury before they began deliberations that the attorney’s remarks were not evidence. In addition, the trial court immediately stopped the witness’s testimony and instructed the jury to disregard it, and she was not allowed to testify any further regarding any similar bad acts evidence. Before the jury began deliberations, the court again instructed the jury to not consider the stricken testimony. A jury is presumed to follow instructions. *People v Bauder*, 269 Mich App 174; 712 NW2d 506 (2005). Hence, even if the prosecutor’s remarks and the witness’s testimony were prejudicial, the trial court cured any error through proper jury instructions.

Defendant next argues on appeal that he was denied a fair trial by the trial court’s ad hoc instructions during voir dire that expressed a bias toward the prosecution. We disagree. The failure to make a timely assertion of a right constitutes a forfeiture of the issue, but an “intentional relinquishment or abandonment of a known right” waives the issue and extinguishes the error, *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000) (quoting *Carines*, *supra* at 762-763 n 7), thereby foreclosing appellate review. *Id.*; *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003). Here, the trial court instructed the jury during voir dire. At the completion of voir dire, the court asked defense counsel if he was satisfied, and defense counsel answered, “Satisfied, your Honor.” In addition, the court asked defense counsel if he wanted the court to reinstruct the jury on anything, and defense counsel answered, “No.” Thus, defendant intentionally waived the instructional issue and any alleged error is extinguished. However, we will review defendant’s related, unpreserved claim of judicial bias during voir dire for plain error that affected defendant’s substantial rights. *Carines*, *supra* at 774. Reversal is warranted only when a plain error resulted in a conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

A criminal defendant being tried by a jury has a right to a fair and impartial jury. *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). Jury voir dire is conducted to ascertain whether prospective jurors can render impartial decisions. *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). “In ensuring that voir dire effectively serves this function, the trial court has considerable discretion in both the scope and conduct of voir dire.” *Id.*; MCR 6.412(C)(1). The practice of voir dire “does not lend itself to hard and fast rules.” *Id.* (quoting *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994)).

A defendant is entitled to a “neutral and detached magistrate.” *People v McIntyre*, 232 Mich App 71, 104; 591 NW2d 231 (1998), rev’d on other grounds 461 Mich 147 (1999). The test to determine judicial partiality is whether the conduct or comments “were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.” *Conley*, *supra* at 308; *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). The party claiming bias “must overcome a heavy presumption of judicial impartiality.” *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). The record should be reviewed as a whole and not taken out of context. *Paquette*, *supra* at 340.

In the instant case, defendant claims that the trial court demonstrated partiality during voir dire by emphasizing that a victim's testimony need not be corroborated and the victim need not resist. After reviewing the trial court's comments in totality, and noting that the trial court had considerable discretion in conducting voir dire, we disagree. In addition to the portion of voir dire to which defendant objects, the trial court *also* instructed the jury regarding the presumption of innocence, the burden of proof, and the definition of "beyond a reasonable doubt." The trial court then went on to quiz the prospective jurors on the burden of proof for 18 transcript pages. Thus, the trial court appears to have not only emphasized the rules of law that a victim's testimony need not be corroborated and that a victim need not resist, but also emphasized that a defendant carries no burden and that the prosecution must prove its case beyond a reasonable doubt. Furthermore, the court gave the standard instructions to the jury before it began deliberating. Consequently, we hold that defendant has not overcome the heavy presumption of judicial impartiality and, therefore, has not shown that he was denied a fair trial.

Affirmed.

/s/ Alton T. Davis

/s/ Bill Schuette

/s/ Stephen L. Borrello